United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1443

To be argued by
ANGUS MACBETH

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1443

UNITED STATES OF AMERICA,
Appellee,

—v.—

ELYAKIM G. ROSENBLATT,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

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Of Counsel.

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(Rev. 1/9/74)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

APPELLEE

v

GLYAKIM G ROSENBLATT,

DEFENDANT-APPELLANT

AFFIDAVIT OF MAILING

76-1443

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ANGUS MACBETH being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York

That on the 27th day of December, 1976 he

by placing the same in a properly postpaid franked envelope addressed as follows:

ROBERT E. GOODMAN, ESQ. COOPERMAN & LEVITT
KOTT, SHAFRO, GOODMAN,
800 THIRD AVE
NEW YORK, NEW YORK 10022

And deponent further says that he sealed the said envelop and placed the same in the mail chute drop for mailing in t UNITED STATES COURTHOUSE ANNEX

Borough of Manhattan, City of New York.

Allegra MacLotte

Sworn to before me this
27th day of December, 1976

Maria A. Israelian

MARIA A. ISRAELIAN
Notary Public, State of New York
No. 31-4521851
Qualified in New York County
Term Expires March 30, 1978

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Elyakim G. Rosenblatt appeals from a judgment of conviction entered on September 24, 1976 in the United States District Court for the Southern District of New York after a four-day trial before the Honorable Constance Baker Motley, United States District Judge, and a jury.

Indictment 76 Cr. 142, filed February 19, 1976 charged Elyakim G. Rosenblatt and Morris D. Brooks in Count One with conspiracy to defraud the United States in violation of Title 18, United States Code, Section 371. Counts Two through Nine charged Brooks alone with false entries on the books of the Postal Service in violation of Title 18, United States Code, Section 2073. On April

14, 1976, Brooks pled guilty before Judge Motley to Counts One and Two of the Indictment.*

On August 10, 1976, the trial against Elyakim G. Rosenblatt began; on August 13, 1976, the jury returned a verdict of guilty on Count One, the only count in which he was charged. On September 24, 1976, Rosenblatt was sentenced to six months' imprisonment and an $8,000 fine. On October 8, 1976, Brooks was sentenced to five years imprisonment, but execution of sentence was suspended and he was placed on probation for five years.

Statement of Facts

A. The Government's Case

The principal witness for the Government was Morris D. Brooks, Rosenblatt's confessed co-conspirator. Brooks testified that he had been employed by the Postal Service in 1974 and 1975 in the accounts payable section of the Postal Data Center at the Postal Service headquarters at 8th Avenue and 33rd Street in Manhattan. (A38-39).** Through his control over the operations of the accounts payable section, Brooks was able to make false entries in Postal Service books, and, thereby, to have issued un-

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* On March 16, 1976, Brooks pled guilty before Judge Gagliardi to a one count indictment, 76 Cr. 143, charging him with stealing a $230,000 check from the Postal Service. This check was never cashed and the crime had nothing to do with Rosenblatt. On October 12, 1976 Brooks was sentenced to six months, execution of sentence was suspended; he was placed on probation for five years and fined $2000.

** Numbers preceded by "A" refer to pages of Appellant's Appendix; "Br." refers to Appellant's Brief; "GX" refers to Government Exhibits.

authorized checks drawn on the United States Treasury. (A35-36, A39).

In July 1974 Brooks obtained two such fraudulent checks, one payable to Gloria G. Brown for $5,500 and one payable to Sara Dudley Brown for $4,500. (A39-40; GX 8, 9). In order to cash these checks Brooks went to Elyakim G. Rosenblatt. Brooks had known Rosenblatt for a number of years, having attended a religious high school with Rosenblatt and having done small favors for him in the following years. (A42-43, A115-16). Brooks told Rosenblatt that the payees of the checks did not want to pay any taxes and for that reason did not want the checks to pass through their accounts. (A44). Rosenblatt demanded a service fee for the cashing of the checks and, after dickering, Rosenblatt agreed that he would cash the two checks for Brooks for a little less than ten percent of their face value. (A44). A few days later Brooks received a little more more than $9000 from Rosenblatt in an envelope carried to him by a common friend, David Hardoon. (A45).

In late October 1974, by the same method of false entries, Brooks obtained a check for $9,700.35 payable to James K. Sullivan. (A35, A45-46; GX 10). Brooks took the Sullivan check to Rosenblatt who was curious as to where Brooks obtained the check. Brooks told him that the payee was getting a kickback on a Government contract and for that reason did not want the money to pass through his account. (A46-47). On that understanding, Rosenblatt agreed to cash the check through a bank account of the Rabbinical College of Queens of which he was dean and manager. (A47, A303, A344-46). Rosenblatt demanded and received approximately ten percent of the face value of the check, or $970, as payment for cashing the check. A few days after delivering the check

to Rosenblatt Brooks received his ninety percent in cash. (A47-48).

Brooks next obtained, by the same method, a check for $27,204.95 payable to H. L. Dalis and dated December 30, 1974. (A35, A48-49; GX 11). Brooks took this check to Rosenblatt. When Rosenblatt inquired about it, Brooks told him that the payee did not want to pay taxes and for that reason did not want to pass it through his account. (A50). On this understanding, Rosenblatt agreed to cash the check and asked Brooks to accompany him to the bank to collect his share of the cash. (A50). When Brooks objected that it would look funny for him to get so much cash, Rosenblatt readily responded with a false cover story: he would tell the bank officer that Brooks had made a loan to his school and was being repaid. (A50). Outside the bank, Rosenblatt took further steps to protect the secrecy of their dealings. David Hardoon, the common friend, had acted as a courier taking some of the envelopes with checks or cash between Rosenblatt and Brooks. Rosenblatt now instructed Brooks not to tell Hardoon anything but rather to deal directly with Rosenblatt. (A51). Inside the bank, Rosenblatt wrote out a check for Brooks for $24,200 and the money was counted out to Brooks by the bank manager in a back conference room. (A52-53; GX 12). Rosenblatt kept the remaining $3,000 as his share. (A54).

Brooks next obtained a check dated March 17, 1975 for $32,000 also payable to H. L. Dalis. (A35, A54; GX 13). The pattern of prior dealings was repeated. Brooks took the check to Rosenblatt who deposited it and a few days later the two went to the bank to obtain the cash. (A55-56). At this time Rosenblatt informed Brooks that he didn't want the paper record to show that he was consistently taking ten percent of the face amount of the

checks. (A56). On that basis, Rosenblatt made out a check to Brokos for $31,000 and after receiving the money in the bank conference room, Brooks turned over to Rosenblatt in cash the approximately $2200 still owing on his ten percent. (A56-57).

In April, 1975, Brooks obtained a third H. L. Dalis check for $24,600. (A35, A58; GX 14). On receiving the check Rosenblatt asked Brooks whether he could expect the Dalis checks on a regular basis. (A59). In order to disguise the ten percent payment, Rosenblatt this time made out a check to Brooks in the full amount of the Dalis check. (A60; GX 14). On May 2, 1975, in the bank, Brooks received three cashier's checks and cash totalling $24,600. (A62-63; GX 16, 17, 18). Brooks and Rosenblatt then went out to Rosenblatt's car and Brooks turned over to Rosenblatt his ten percent of the proceeds. (A63). With the $2,460 in hand Rosenblatt returned to the bank and visited his personal safety deposit box. (GX 44; A361).

Brooks next obtained a check payable to Frank B. Conley for $42,500 dated July 28, 1975. (A35, A65; GX 18). In response to Rosenblatt's inquiry, Brooks told him that Conley had a contract with the Government and was getting a kickback and for that reason did not want the check to pass through his account. Rosenblatt inquired when more checks would be available. (A66). Pursuant to their standing arrangement, Rosenblatt laundered the check through the account of the Rabbinical College of Queens, keeping approximately $4,250, or ten percent, for his trouble. (A67-74).

On or about August 14, 1975, Brooks obtained a final H. L. Dalis check dated July 14, 1975 for $38,500.* (A35,

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* Brooks' receipt of the check was delayed because the check was mismailed. (A75-76).

A74-76; GX 24). The prior pattern of behavior was repeated. Rosenblatt cashed the Dalis check for $3,850 or ten percent of the proceeds. He paid Brooks in installments in the days immediately following the receipt of the check. (A81-83). Rosenblatt visited his safety deposit box on August 18, 19, and 20, 1975. (GX 44).

Rosenblatt concluded this last transaction by asking Brooks when there would be more checks. (A83). Rosenblatt talked to Brooks again in September and October pressing his inquiries as to more checks. (A84). Brooks assured him there would be some before long. (*Id.*).

In sum, Brooks testified that he had obtained more than $180,000 in eight fraudulent checks drawn on the Treausry of the United States and that Rosenblatt had cashed these checks for approximately ten percent of the proceeds on the understanding that the payees wished to beat their taxes or were concealing kickbacks on Government contracts.

David Hardoon testified, in corroboration of Brooks' testimony, that he acted as an unwitting courier between Brooks and Rosenblatt. (A171, 173). He stated that Brooks had told him that Rosenblatt did not want him, Hardoon, to know anything of what was going on. (A175). Hardoon further testified that he had confronted Rosenblatt about the dealings with Brooks, telling him, "I think something is wrong" and that Rosenblatt replied, "Don't worry. He told me about about [sic] it. I know Dali." (A175).*

Irving Fischer, manager of H. L. Dalis, Inc., testified that Harry L. Dalis was dead and that he knew of no

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* Brooks testified that Rosenblatt pronounced "Dalis" as Dali. (A55).

dealings between H. L. Dalis, Inc. and Rosenblatt. (A204-05). Matthew Rankel, the manager of the bank at which Rosenblatt and Brooks transacted their business, testified about the transactions in the bank. Rankel testified that the sums of cash requested by Rosenblatt were so large that from time to time Rosenblatt would call in advance so that the bank could have sufficient currency on hand. (A207-222).

It was stipulated that Brooks fraudulently obtained the checks from the Postal Service and it was also stipulated that Rosenblatt did not know that Brooks had made the false entries or stolen the checks from the Postal Service. (A35-36).

B. Defendant's Case

Rosenblatt took the stand in his own defense. He admitted cashing the checks for Brooks, but denied that Brooks had told him anything about taxes or kickbacks. (A312-13). He contended that Brooks told him that "Inc." had been omitted from the first two checks and the payees did not want to go through the time-consuming process of having the checks reissued by the post office. (A307). As to the other checks, Rosenblatt said that Brooks gave him no explanation as to how he had obtained them and that he had asked for none. (A378). Rosenblatt admitted taking money from Brooks in return for cashing the checks but said that he took much less than ten percent. (*E.g.*, A353—$500; A361—$1000; A368—$1000). Rosenblatt admitted that he had made deposits into his personal safety deposit box of cash received from Brooks in cashing the checks but told the jury that the charitable fund for his Rabbinical College was kept in his personal safety deposit box and these deposits were in fact for the charity fund. (A322, A361, A379).

Rosenblatt called sixteen character witnesses in his own behalf. (A277-301, A334-44, A379-A411). Although his character witness frequently described Rosenblatt as naive and unwordly, (*e.g.*, A295, A401, A402-06, A410), on cross-examination Rosenblatt admitted to being the manager of three religious and educational institutions, the Rabbinical College of Queens, the Beth Jacob Seminary of Queens and the Grand Central Synagogue, which had a total of approximately ten bank accounts on which he was the sole signatory. (A344-46).

C. Government's Rebuttal

When withdrawing funds from the bank Brooks and Rosenblatt occasionally took official bank checks instead of cash. Rosenblatt testified that these official checks recorded transactions between Brooks and the bank with which he had nothing to do. (A364-66). On rebuttal the Government recalled Matthew Rankel who testified that Rosenblatt was present when the official checks were issued and in one case actually received the funds when the official check was cashed. (A415-16).

ARGUMENT

POINT I

The Evidence was Sufficient to Support the Verdict that Rosenblatt Entered into a Conspiracy to Defraud the United States.

Defendant Rosenblatt contends that the proof at trial did not show an agreement between Brooks and Rosenblatt sufficient to support a conviction for conspiracy to defraud the United States in violation of Title 18, United States Code, Section 371. (Br. 12-24). Rosenblatt reaches

this conclusion by a faulty analysis of the agreement required to make out a crime under Section 371. The proof shows that Rosenblatt's agreement with Brooks was fully sufficient to meet the terms of Section 371.

The indictment in this case charged that Rosenblatt violated Section 371 in that he and Brooks combined, conspired, confederated and agreed together and with each other to defraud the United States. The paragraph of the indictment setting out the means by which the conspiracy was carried out stated that it was part of the scheme that Brooks would fraudulently obtain Treasury checks through his Postal Service position; that Brooks told Rosenblatt that the payees did not want the checks to pass through their accounts for various nefarious reasons, including tax evasion, and that Rosenblatt and Brooks divided the proceeds of the checks, Rosenblatt keeping approximately ten percent for himself. (A4-5). Thus the indictment set out the object of the conspiracy and the manner of its operation.

The proof at trial demonstrated that, as charged in the indictment, Brooks and Rosenblatt had conspired to defraud the United States. Rosenblatt took more than $18,000 for the cashing of eight Government checks on the understanding that he was helping others cheat the Government. His consciousness of guilt was amply shown by his dedication to secrecy and his readiness to lie to others to conceal the nature of the transactions in which he was involved. There is no question that Brooks knew more of the total workings of the fraud involved in these transactions than did Rosenblatt. There is also no question but that Rosenblatt knew that he was engaged in defrauding the Government and that he joined with Brooks to pursue that end.

Rosenblatt claims that the Government has failed to allege and to prove a conspiracy which falls within

the terms of 18 United States Code, Section 371. That Section reads in pertinent part:

> "If two or more persons conspire . . . to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more such persons do any act to effect the object of the conspiracy each shall be [guilty of a crime]"

This branch of the statute prohibiting conspiracy to defraud the United States has historically been given a very broad reading, the phrase "in any manner or for any purpose" being taken to give the statute the widest scope. In its last interpretation of the language, the Supreme Court reaffirmed the early and standard reading of the statute as reaching "any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government," *Dennis* v. *United States*, 384 U.S. 855, 861 (1966) quoting *United States* v. *Johnson*, 383 U.S. 169, 172 (1966) which, in turn, was quoting *Haas* v. *Henkel*, 216 U.S. 462, 479 (1910). This Court has more recently reviewed that language and held that it is still good law, *United States* v. *Peltz*, 433 F.2d 48 (2d Cir. 1970).* Far from being introduced to narrow the scope of the statute the phrase "in any manner or for any purpose" has historically been interpreted to show that the Congress was expressly expanding the notion of fraud in the statute so that it would not be fettered or confined by notions of common law fraud or fraud committed solely for purposes of pecuniary gain. *E.g.*, *United*

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* In that opinion Judge Friendly pointed out that defrauding has been held to have an element of trickery or deceit by the Supreme Court, *Hammerschmidt* v. *United States*, 265 U.S. 182 (1924), an element not at issue in *Haas* and not disputed by the defendant here, and that the *Hammerschmidt* opinion did not narrow the holding of *Haas*.

States v. *Keitell*, 211 U.S. 370, 393 (1908) ("The contention that the word 'defraud' must be confined to its common-law significance . . . is without merit. . . . This follows because the argument rests upon the assumption that the word 'defraud' stands alone in the statute, and ignores the broader meaning which must result from the words 'in any manner or for any purpose,' by which the word 'defraud' is accompanied in the statute."); *McGregor* v. *United States*, 134 F. 187, 195 (4th Cir. 1904) ("The language of the statute clearly contemplates that the loss or damage may be other than a pecuniary one susceptible of accurate calculation. The words 'in any manner or for any purpose' are most comprehensive, and show that the intention of the law-making power was to have the statute as broad and as comprehensive as it could possibly be.")

In the light of this history it is clearly enough to charge that the defendant entered a conspiracy to defraud the United States. The statute does not require the setting out of any particular type or form of fraud or scheme on which the defendants have agreed. *See Williamson* v. *United States*, 207 U.S. 427, 449 (1908); *United States* v. *Croxton*, 482 F.2d 231, 233 (9th Cir. 1973). The Government has met that burden in the present indictment through the charge in the first paragraph of the indictment and did in fact set out the nature of scheme in the fourth paragraph. That paragraph showed this conspiracy to defraud to be a classic one for pecuniary gain.

Rosenblatt contends that his mind did not sufficiently meet with that of Brooks to be in violation of the statute. The statute requires that the minds of conspirators meet in an agreement to defraud the United States. No more is needed. Rosenblatt's mind met with Brooks' on that central nature of their common fraud,

the only ground of importance. Brooks described the scheme to Rosenblatt as one to defraud the Government and both Brooks and Rosenblatt knew that the scheme was one to defraud the Government. There is no question that the scheme involved trickery and deceit. *See Hammerschmidt* v. *United States, supra.* That is all that is needed to support the conviction and that was amply shown at trial and fairly presented to the jury in the instructions of the court.*

It simply does not matter that Rosenblatt planned to defraud the Government through helping others evade taxes and conceal kickbacks while Brooks planned to defraud the Government by stealing checks and laundering the money through Rosenblatt's checking accounts. So long as the conspirators' words or actions show them to be in agreement on the matters required by the statute their separate plans beyond that are irrelevant. This is shown graphically by two decisions of this Court. In *United States* v. *Gersh*, 328 F.2d 460 (2d Cir.), *cert. denied*, 377 U.S. 992 (1964), the defendants were indicted for conspiracy to possess counterfeit funds. One group planned to sell the counterfeit to another. The second group took the counterfeit at gunpoint from the first group. The Court made short shrift of the notion that this radical divergence of plans barred a conspiracy conviction:

> "The claim that Mugnola and Yuastella could not have conspired with De Santis et al. since the

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* By its careful charge on this issue (A507-15), the District Court followed the instructions of this Court in *United States* v. *Borelli*, 336 F.2d 376, 386 n. 4 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965): "[W]e hold only that where the evidence is ambiguous as to the scope of the agreement made by a particular defendant and the issue has practical import the court must appropriately focus the jury's attention on that issue. . . ."

> former intended to steal and the latter intended to sell verges on the ludicrous. The statute forbids possession of counterfeit with intent to defraud; the evidence amply warranted the jury in finding that appellants agreed to bring the counterfeit first into DeSantis' possession and later into Mugnola's and Yuastella's. There was no less a meeting of the minds on this because, whether initially or later, Mugnola and Yuastella determined to deceive the deceiver." 328 F.2d at 462.

In *United States* v. *Finkelstein*, 526 F.2d 517 (2d Cir. 1975), the indictment charged a conspiracy to manipulate the price of stock; the proof showed that one conspirator was also working to defraud his co-conspirators through further manipulations of which he had not informed them. The defendants claimed that this fact could not support a charge of a single conspiracy. This Court disagreed and held that "both groups of stock sales manifested a unifying purpose—namely bilking the unsuspecting public by foisting worthless stock upon it." 526 F.2d at 521.

Once there has been shown an agreement on the statutory requirements of the conspiracy, here a conspiracy to defraud the United States, further knowledge among the conspirators of the plans or intentions of others is of no moment. It is well established law that each conspirator need not know the identity or number of his co-conspirators or the means used by other conspirators to reach the common objective. *Blumenthal* v. *United States*, 332 U.S. 539 (1947); *United States* v. *Koss*, 506 F.2d 1103, 1113-14 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975); *United States* v. *Bennett*, 409 F.2d 888, 893 (2d Cir.), *cert. denied*, 396 U.S. 852 (1969); *Blue* v. *United States*, 138 F.2d 351, 358 (6th Cir. 1943), *cert. denied*, 322 U.S. 736 (1944) ("If one's

intent is to defraud when he joins a dishonest scheme, he becomes a part of the scheme, although he may know nothing but his own share in the aggregate wrongdoing"); *Nassif* v. *United States*, 370 F.2d [illegible] (8th Cir. 1966); *United States* v. *Vigi*, 363 F. Supp. 314, 320 (E.D. Mich. 1973).

Rosenblatt invites the Court to indulge in various considerations not required by the case before it. First, contrary to Rosenblatt's suggestion, (Br. 14-15), the indictment here did not charge a conspiracy to make false entries in Postal Service books or to evade taxes. The Court need only be concerned with the actual indictment which was fairly put to the jury as charging Rosenblatt with conspiracy to defraud the United States and which the jury, on the facts before it, found proved. Second, Rosenblatt raises the possibility that the Government might indict under the "defrauding of the Government" branch of Section 371 rather than under the "conspiracy to violate" branch of the statute in order to circumvent the requirement of proving intent to violate another federal law. (Br. 23). However, use of this "defrauding" portion of Section 371 is plainly a course open to the grand jury, *Dennis* v. *United States*, *supra* 384 U.S. at 862-64, and one whose possible abuse need not concern the Court in the context of this case. Indeed, it is the defendant's position that would lead to a disturbing anomaly in the law. It must be conceded that the proof showed that Rosenblatt intended to defraud the United States. Through his agreement with Brooks, who shared that intent, and their common, concerted action, they in fact pocketed more than $180,000 of fraudulently obtained Government funds. Yet Rosenblatt claims his behavior stands outside the ambit of the criminal law, arguing that the law which makes it criminal to conspire to defraud the United States requires the Govern-

ment to show more than this. Such a reading of the law would defeat its historic purpose, narrowing the scope of the conspiracies which it covers and placing, as in the case at bar, many effective and smoothly operative conspiracies beyond the reach of the law.

In a closely related point, Rosenblatt claims that because Brooks did not specifically tell him that the payees of the checks sought to evade taxes and because the payees' motive of concealing kickbacks was implausible, there is insufficient evidence to support a conviction to defraud the United States. (Br. 34-40). This claim is without merit.

It is hornbook law that the Government need not show that conspirators sat around a table drawing up a solemn compact in which the details of their conspiratorial scheme are spelled out, frequently much is left to the unexpressed understanding of the conspirators. The Government may show the terms of the conspiracy by the actions of the conspirators. Here Rosenblatt's behavior shrieks of his knowledge and understanding that he and Brooks were engaged in a criminal conspiracy. He repeatedly accepted well in excess of $1000 for the cashing of single Government checks which on their face appeared valid. *See United States* v. *Jacobs*, 475 F.2d 270 (2d Cir.), *cert. denied*, 414 U.S. 821 (1973). He hid much of the cash away in his personal safety deposit box. He sought to conceal the nature of his transactions and when asked about them promptly lied in order to maintain the secrecy of the scheme. Regardless of the exact words used by Brooks in telling Rosenblatt that the payees did not want to pay taxes, (A44, A50), or the argument that this method of hiding kickbacks would be discovered in the long run, there was ample evidence for the jury to conclude that the conspirators had agreed to and acted on a scheme to defraud the Government. It strains the imagination to put any other interpretation on Rosenblatt's acts.

The argument that the Government failed to show that there were in fact taxes owing to the United States is beside the point. This prosecution was for a conspiracy to defraud the United States and not for tax evasion or conspiracy to evade taxes. The necessary agreement and an overt act were shown. Nothing more is needed.

POINT II

Venue Was Properly Found in the Southern District of New York.

Rosenblatt contends that no overt acts in furtherance of the conspiracy took place in the Southern District of New York and that therefore venue was not found in that district. (Br. 24-34). The Government proved four overt acts in the Southern District of New York committed in furtherance of the conspiracy and thus the venue of the trial was properly in that district. Rosenblatt's claim is without merit.

Title 18, United States Code, Section 371 requires that in proving a conspiracy to defraud the United States, the Government prove an act by a conspirator to effect the object of the conspiracy. One of the overt acts done in furtherance of the conspiracy must be proven to have taken place in the judicial district in which the Government claims venue. (A5-8). 18 U.S.C. 3237(a); Fed. R. Crim. P., 18; *Hyde* v. *United States*, 225 U.S. 347 (1912); *United States* v. *Ellenbogen*, 365 F.2d 982 (2d Cir. 1966); *United States* v. *Fabric Garment Co.*, 262 F.2d 631 (2d Cir. 1958); *United States* v. *Valle*, 16 F.R.D. 519 (S.D. N.Y. 1955). In the indictment four overt acts in the Southern District of New York are charged; each is the making of a false entry on a Postal Service form by

Morris D. Brooks which resulted in the issuing of a Government check which was later cashed by Rosenblatt and the proceeds divided between Rosenblatt and Brooks. (A5-8). Although Rosenblatt now claims that no overt acts in furtherance of the conspiracy took place in the Southern District of New York the evidence of these acts of Brooks in Manhattan not only came in wihout objection but by stipulation. (A35).

There is thus no question that the Government proved acts of Brooks in the Souhern District. Rosenblatt claims the acts were not in furtherance of the conspiracy. On any objective view of the matter this is far-fetched indeed since Brooks' acts in Manhattan produced the checks which Rosenblatt, pursuant to the conspiracy, cashed in Queens and divided with Brooks.

At bottom Rosenblatt's claim is that he did not foresee the overt acts which Brooks committed in the Southern District and which are charged in the Indictment and therefore venue does not lie in the Southern District and he cannot be held to trial here. Rosenblatt builds up this theory by repeated citation to cases which state that a conspirator is only liable for those purposes or agreements in a conspiracy which he understands or is aware of. *E.g.*, *United States* v. *Borelli*, 336 F.2d 376, 385 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965); *United States* v. *Andolschek*, 142 F.2d 503, 507 (2d Cir. 1944). These cases do not deal with venue and overt acts, they address themselves to the scope of the conspiracy and particularly to whether or not the defendant had been convicted properly of one conspiracy or on a count improperly charging multiple conspiracies. *E.g.*, *United States* v. *Greer*, 467 F.2d 1064, 1070 (7th Cir. 1972), *cert. denied*, 410 U.S. 929 (1973); *United States* v. *Andolschek*, *supra*; *United States* v. *Peoni*, 100 F.2d 401, 403 (2d Cir. 1938) (all

deal with claims of multiple rather than single conspiracies); *United States* v. *Borelli*, *supra* (claim that conspiracy of which defendant was a member terminated at time for which prosecution was barred by statute of limitations). In fact Rosenblatt cites the Court no case in which it is held that an overt act is inadmissible against a defendant because he did not know or contemplate its exact nature despite the fact that the act objectively furthered the conspiracy.*

Rosenblatt does not present such cases because such principles do not reflect the standards of the law. It is beyond dispute that each conspirator need not know the identity of all his co-conspirators. *Blumenthal* v. *United States*, *supra*; *United States* v. *Braverman*, 522 F.2d 218, 222 (7th Cir.), *cert. denied*, 423 U.S. 985 (1975), nor the means by which they seek to achieve the conspiratorial end. *Blue* v. *United States*, *supra*. It must follow that the Government is not required to prove that each conspirator know the details of each act of his co-conspirators. The acts of those co-conspirators in furtherance of the conspiracy are nonetheless overt acts in furtherance of the conspiracy. *United States* v. *Campanale*, 518 F.2d 352, 360 n. 17 (9th Cir. 1975) ("It

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* Although not necessary as a matter of law, the Government's case demonstrated that it was within Rosenblatt's contemplation that Brooks would take some action in the Southern District which would be in furtherance of the conspiracy. Rosenblatt knew Brooks worked in the post office in Manhattan, having had him mail letters while at work. (A389-91). There can be no doubt that the checks were associated in Rosenblatt's mind with the post office since he claimed that Brooks told him that the post office ticker had left "Inc." off the payee's title on the first two checks. (A307). Given these facts, it is only reasonable to assume that Rosenblatt could foresee some action by Brooks in Manhattan which would be in furtherance of the conspiracy.

is hornbook law that co-conspirators need not agree to the overt acts of other co-conspirators, only that the overt acts must be in furtherance of the conspiracy"). And there is no question that venue for a conspiracy is properly found in any district where an overt act took place. *Hyde* v. *United States, supra; United States* v. *Ellenbogen, supra; United States* v. *Fabric Garment Co., supra; United States* v. *Valle, supra.* The long and the short of the matter is that an objective standard governs the law on this point: was the act done by a member of the conspiracy and would a reasonable man conclude that the act was done in furtherance of the conspiracy? It does not matter whether the act is innocent or criminal, bizarre or banal, so long as it furthers the conspiracy. The acts charged in this indictment certainly meet that standard.

Rosenblatt attempts to mislead the Court by assuming that there is some magic in the fact that the overt acts alleged in this indictment were themselves criminal and therefore the conspiratorial agreement had to embrace those crimes to the knowledge of all conspirators. That is not so. If the indictment stated that Brooks rode to Manhattan on the Long Island Railroad or put a stamp on a letter addressed to himself in furtherance of the conspiracy, it would not be required that these transactions be directly recognized in the conspiratorial agreement so long as the acts furthered the agreement. So too it is irrelevant to Rosenblatt's guilt of the conspiracy charge that the overt acts charged against Brooks happen to be criminal ones of which Rosenblatt did not know. Rosenblatt has not been charged under the principles of *Pinkerton* v. *United Sates*, 328 U.S. 640 (1946), nor is there any evidence whatsoever of multiple conspiracies in this case and all speculation based on what would be the case if either of those possibilities were an actuality should be put aside. They have no bearing on the case at bar.

Brooks' acts in the Southern District are conceded. By any objective standard there can be no doubt that they furthered the conspiracy of which Rosenblatt was a member. They were therefore overt acts in furtherance of the conspiracy and venue in the Southern District is proper.

POINT III

The Disrict Court's Charge Was Without Error.

Rosenblatt claims that the District Court's instructions to the jury were in error because they did not adopt Rosenblatt's theories as to what the Government was required to show to prove a conspiracy to defraud the United States and what acts could properly be found by the jury to be overt acts in furtherance of the conspiracy. (Br. 41-42). These points must fall with Rosenblatt's mistaken view of the law on the underlying issues. It would not have been proper to charge that if the defendants sought to achieve the conspiratorial ends by diverse means no conviction could be returned. The Government was required to prove no more than an agreement to defraud the Government; a charge incorporating anything else would have been error. The suggested charge adapted from *Pinkerton* v. *United States, supra,* is also inapposite. The *Pinkerton* language is addressed to substantive crimes with which a defendant is charged, not overt acts. Rosenblatt in this case was not charged with Brooks' substantive crimes and reference to *Pinkerton* was therefore unnecessary.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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